King Soopers, Inc. *and* Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 26, AFL–CIO *and* United Food and Commercial Workers Union, Local 7. Cases 27–CA–16091 and 27–CA–16197

September 13, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On June 21, 1999, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel and Charging Party United Food and Commercial Workers Union, Local 7 (UFCW Local 7) filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, King Soopers, Inc., Broomfield, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Within 14 days from a request, permit employee Lisa Hughson to transfer to another store in the Bakery Workers Local 26 Denver bargaining unit under the terms and conditions set forth in the collective-bargaining agreement between the Respondent and Bakery Workers Local 26."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Bakery Workers Local 26, or withdraw recognition from the Union as the exclusive bargaining representative of the bakery department employed by us at our store #86 in Broomfield, Colorado.

WE WILL NOT refuse or fail to apply the terms and conditions of our collective-bargaining agreement with Bakery Workers Local 26 covering store #8 to store #86 in Broomfield.

WE WILL NOT refuse to bargain with UFCW Local 7 or withdraw recognition from the Union as the exclusive bargaining representative of the grocery and delicatessen employees employed by us at our store #86 in Broomfield, Colorado.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We agree with the judge that the Respondent's relocated Broomfield store #86 is substantially the same operation as the Respondent's closed Broomfield store #8, and that the transferees from store #8 constitute a substantial percentage of the employee complement of store #86. Indeed, we note that an overwhelming majority of the employees at store #86 were transferees from store #8. In these circumstances, Member Hurtgen finds it unnecessary to rely on the mathematical percentage of 40 percent minimum relied on by the judge in determining what constitutes a substantial percentage of the employee complement at store #86.

We agree with the judge that the address of the Respondent's store #8 contained in the recognition clause of UFCW Local 7's collective-bargaining agreement with the Respondent is the parties' descriptive recitation of the physical location of store #8 and is not indicative of the collective-bargaining agreement's geographic limitation to store #8. In so doing, we adopt the judge's application of the Board's present "clear and unmistakable wavier" analysis. See *Teamsters Local 71*, 331 NLRB No. 18 (2000). Member Hurtgen reaches this result under a "contract coverage" analysis rather than a "waiver" analysis. See his partial dissent in *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999). Under this analysis, Member Hurtgen finds that the intention of the parties was to have the contract cover the unit employees. Those unit employees were at store #8 at the time of the contract and are now at store #86. However, this fact does not gainsay the contractual intention to cover the unit employees. Member Hurtgen would reach the same result under a "waiver" analysis.

[3] The judge concluded that the February 27, 1990 agreement between the Respondent and Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 26, AFL–CIO "accreted" the Broomfield bargaining unit into the Denver bargaining unit. However, we note that the Broomfield bargaining unit "merged" with the Denver bargaining unit, and that "merger"—not "accretion"—is the correct designation for what occurred.

[4] There is an inadvertent omission in the judge's recommended Order with respect to the affirmative requirement that the Respondent offer transfer privileges to employee Lisa Hughson. We hereby correct it. We also note that the judge erroneously indicated that *Sullivan Bros. Printers Inc.*, 317 NLRB 561 (1995), had been denied enforcement in the First Circuit. The Board's decision was affirmed in *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217 (1996). The judge inadvertently cited the appellate proceeding involving the Board's request for a 10(j) injunction in that case.

WE WILL NOT refuse or fail to apply the terms and conditions of employment of our grocery and delicatessen collective-bargaining agreement with UFCW Local 7 covering store #8 to store #86 in Broomfield.

WE WILL NOT bypass UFCW Local 7 and deal directly with bargaining unit employees concerning terms and conditions of employment for grocery and delicatessen employees at store #86 in Broomfield.

WE WILL NOT refuse to permit bakery department employees to transfer from one store to another store under the terms and conditions set forth in the Denver area collective-bargaining agreement between us and Bakery Workers Local 26.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL bargain with Bakery Workers Local 26 as the exclusive representative of the bakery department employees employed at our store in Broomfield, Colorado.

WE WILL permit employee Lisa Hughson to transfer to another store in the Bakery Workers Local 26 Denver bargaining unit under the terms and conditions set forth in the Denver area collective-bargaining agreement between us and Bakery Workers Local 26.

WE WILL bargain with UFCW Local 7 as the exclusive representative of the grocery and delicatessen department employees employed at our store #86 in Broomfield, Colorado.

WE WILL make all fringe benefit contributions as provided by the collective-bargaining agreements with Bakery Workers Local 26 (bakery department employees) and UFCW Local 7 (grocery and delicatessen department employees), and make whole the employees in each bargaining unit by reimbursing them with interest for any losses they may have suffered as a result of our failure to abide by the terms of the two collective-bargaining agreements referenced above.

KING SOOPERS, INC.

Barbara E. Greene and *Angela Harmeyer*, for the General Counsel.

Raymond M. Deeny and *Emily Keimig (Sherman & Howard),* of Colorado Springs and Denver, Colorado, for the Respondent.

Walter C. Brauer III (Brauer, Buescher, Valentine, Goldhammer, Kelman, & Eckert), of Denver, Colorado, for Bakery Workers Local 26.

Michael J. Belo, of Wheat Ridge, Colorado, for UFCW Local 7.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Denver, Colorado, on April 7 and 8, 1999. On October 13, 1998, Bakery, Confectionery, and Tobacco Workers International Union, Local 26, AFL–CIO, (Bakery Workers Local 26) filed the charge in Case 27–CA–16091 alleging that King Soopers, Inc. (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On January 4, 1999, United Food and Commercial Workers Union, Local 7 (UFCW Local 7) filed the charge in Case 27–CA–16197 against Respondent. On March 4, 1999, the Regional Director for Region 27 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed timely answers to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with various offices and facilities in Colorado, where it has been engaged in the retail sale of groceries and related items. Respondent annually derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $5000 from outside the State of Colorado. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that UFCW Local 7 is a labor organization within the meaning of Section 2(5) of the Act.

Based on a merger between the Bakery, Confectionery, and Tobacco Workers International Union with the Grain Millers International Union, Respondent denied the labor organization status of Bakery Workers Local 26.[2] That issue will be discussed in more detail below.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent operates a chain of grocery supermarkets in Colorado, including one store in Broomfield, Colorado. This case involves Respondent's Broomfield store. Prior to December 9, 1998, Respondent operated one store in Broomfield, located at 5150 West 120th Avenue (store #8). On December 9, 1998, Respondent closed store #8 and opened a replacement store at 12167 Sheridan Boulevard in Broomfield (store #86), approximately a thousand yards from the former location. Bakery Workers Local 26 has represented the employees in the

[1] The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] The General Counsel amended the complaint to change the name of Bakery Workers Local 26 from Bakery, Confectionery, and Tobacco Workers International Union, Local 26 to Bakery, Confectionery and Tobacco Workers, and Grain Millers International Union, Local 26.

store bakery in the Broomfield store since 1990. UFCW Local 7 had represented the grocery and delicatessen employees in the Broomfield store since at least 1993. Prior to opening the new Broomfield store, Respondent notified the grocery and delicatessen employees that the new Broomfield store would be operated on a nonunion basis. Respondent also notified UFCW Local 7 that it considered its collective-bargaining agreement limited to the specific site of 5150 West 120th Avenue and, therefore, not binding on the new location. Respondent later took the same position regarding the bakery employees and notified Bakery Workers Local 26 that the new store would operate on a nonunion basis. Respondent notified both Unions that they could seek representation through the Board's processes. Both Unions took the position that their collective-bargaining agreements were still in effect and were not affected by the relocation of the store.

In this case, the General Counsel alleges that Respondent failed and refused to recognize the Unions at store #86 after moving the operation and employees from store #8 to store #86 on December 9, 1998. The complaint also includes allegations that Respondent unlawfully notified employees that the new store #86 would be operated on a nonunion basis rather than under their collective-bargaining agreement, dealt directly with employees represented by UFCW Local 7, and unilaterally changed terms and conditions of employment from the respective bargaining agreements to the terms and conditions of employment that Respondent maintained for unrepresented employees. Respondent denies the commission of any unfair labor practices. Further, Respondent contends that the bargaining agreements with each of the Unions were "site specific," limited to the address of store #8, and could not be applied to store #86 or any other location. Further, as mentioned above, Respondent contends that it has no obligation to bargain with Bakery Workers Local 26 on the ground that the merger between the Bakery Workers International Union and the Grain Millers International Union raised a question concerning representation.

B. The Bargaining Relationships

Respondent operates over 80 retail grocery stores in the State of Colorado. In many of these facilities, the grocery clerks are represented by UFCW Local 7 and the bakery department employees are represented by Bakery Workers Local 26. In addition to representing store clerks, UFCW Local 7 represents meat department employees in bargaining units separate and apart from the grocery clerks units.

Respondent operated King Soopers store 8, located at 5150 West 120th Avenue in Broomfield, Colorado. The UFCW Local 7 represented the grocery and delicatessen employees at this store in a single store bargaining unit:

> All employees actively engaged in the handling and selling of merchandise, including part-time workers who work regularly one (1) day or more a week, and delicatessen employees, employed by the Employer in the grocery store owned or operated by the Employer at 5150 West 120th Avenue, Broomfield, Colorado (such jurisdiction to apply to the current store represented by the Union), but excluding all store managers, first assistant managers, associate managers, office and clerical employees, meat department employees, demonstrators, watchmen, guards, professional employees and supervisors as defined in the National Labor Relations Act as amended.

Respondent recognized UFCW Local 7 as the bargaining representative of the grocery and delicatessen employees at store 8 based on a card check in 1987. The 1993–1996 collective-bargaining agreement between Respondent and the UFCW Local 7 contained the recognition clause set forth above. At the expiration of the 1993–1996 agreement a strike ensued. On June 14, 1996, the parties entered into a strike settlement agreement. However, a new collective-bargaining agreement for store 8 was not reduced to writing. The parties used the collective-bargaining agreement for the Metropolitan Denver Area facilities as their working document. There were four major differences between the Metropolitan Denver agreement and the single Broomfield store agreement. The Denver area agreement covers "stores owned or operated by the Employer within the metropolitan area of Denver, Colorado (such jurisdiction to apply to current stores represented by this Union and future stores only of the Employer).'' In addition the four major differences were: the clerks in the Broomfield store were covered under Respondent's nonunion health plan; the vendor stocking language at the Broomfield store was broader; the Broomfield store did not have a union–security clause; and the Broomfield store unit included delicatessen employees.

No evidence was offered to explain the language in the recognition clause, "such jurisdiction to apply to the current store represented by the Union". The collective-bargaining agreement between UFCW Local 7 and Respondent covering the meat department employees at the Broomfield store contained language applying to the meat market or meat markets owned or operated by Respondent in Broomfield, Colorado. The recognition clause further stated, "Within the geographical jurisdiction of this Agreement, any new stores operated by the Employer shall be accreted and shall be covered by this Agreement." The meat department bargaining contract was applied to store 86 when Respondent opened that store in December 1998.

In February 1990, Bakery Workers Local 26 was certified as the exclusive bargaining representative of the bakery employees at the Broomfield store. The unit was as follows:

> All full-time and part-time production bakers and cake decorators employed by King Soopers, Inc., at its retail bakery outlet located at 5105 West 120th Avenue, Broomfield, Colorado; but excluding all other employees, including office clerical employees, supervisors and guards as defined in the Act.

On February 27, 1990, Respondent and Bakery Workers Local 26 executed an agreement whereby this single store unit was accreted into the Denver Metropolitan area multi-store bargaining unit. The agreement states "effective February 25, 1990, the employees of the Broomfield bargaining unit shall be accreted into the Denver bargaining unit and by this agreement the Denver bargaining unit shall be expanded to cover the inclusion of this unit." The 1997–2001 agreement describes the unit as follows:

> Employees employed in the classifications set forth in this Agreement at the Employer's Denver, Colorado plant and in-store bakeries in the Denver Metropolitan area, Colorado Springs, Colorado, and Pueblo, Colorado area. Except for the Employer's Cinna-monster and current deli operations, any retail bakery production work performed

> on the premises shall be work covered under the jurisdiction of this Agreement (such work to include franchised operations and all work historically covered by this Agreement). Excluded are all office-clerical employees, professionals and supervisors as defined in the Act.

Respondent contended that there had been no accretion in 1990. According to Respondent, the parties had merely agreed to apply the terms of the Denver agreement to the employees in the Broomfield single store unit. However, I reject that argument. First, the February 27, 1990 agreement clearly states that the Broomfield store will be an accretion to the Denver unit. Second, starting February 1990, the parties acted consistently with an accretion. Thus, after February 1990, there was never a separate Broomfield contract and the terms of the Denver agreement were applied to the Broomfield store. I find that as an accretion to the Denver bargaining unit, the bakery department at the Broomfield store ceased to exist as a separate unit and became part of the Bakery Workers' Denver multistore bargaining unit.

C. The Closing of Store 8

On September 8, Steve DiCroce, Respondent's director of human resources, sent a letter to the grocery and delicatessen employees at the Broomfield store. The letter informed the employees that Respondent was closing store 8 and that the employees would be offered employment at a "new" store, store 86. The letter stated that employment at store 86 would be under the Respondent's General Conditions of Employment for Non-Represented Employees rather than under the collective-bargaining agreement. Respondent also reminded the employees that store 8 was an open shop and that employees did not have to be union members to work at store 86. Respondent did not send a copy of this letter to UFCW Local 7.

On September 28, DiCroce sent a letter to Ernest Duran, president of UFCW Local 7, stating that Respondent would not recognize UFCW Local 7 as the bargaining representative of the clerks at the new store 86 until the Union demonstrated majority status through an NLRB election. Duran responded stating that the bargaining unit employees should be covered by the contract. On November 24, Duran again wrote DiCroce, stating that it was his position that the collective-bargaining agreement from store 8 should apply at store 86. On December 7, Michael Belo, general counsel of UFCW Local 7, wrote DiCroce requesting recognition for UFCW Local 7 at store 86 and application of the contract for store 8 at store 86. In early December, UFCW Local 7 notified Respondent that since store 86 was going to be operated on a nonunion basis, grocery and delicatessen employees should be released from their dues-checkoff obligations. In mid-December, Respondent notified the grocery and delicatessen employees that dues would not be deducted from their paychecks.

On September 30, DiCroce wrote Bakery Workers Local 26 giving notice that Respondent was going to close store 8. DiCroce further notified the Union that Respondent would not recognize Bakery Workers Local 26 at store 86 until the Union demonstrated majority status through an NLRB election. In a subsequent meeting with Avron Bergman, then the president of Bakery Workers Local 26, DiCroce suggested a card check to demonstrate majority status. Bergman maintained that store 86 was a replacement for store 8 and that the bargaining agreement automatically applied.

On December 8, Respondent closed store 8 located on the Northeast corner of 120th Avenue and Sheridan Boulevard. The very next day, Respondent opened store 86 at 12167 Sheridan Boulevard at the corner of 120th Avenue. All of the employees who were employed at store 8 began work at store 86. The work schedule set forth at store 8 was continued at store 86. Employees were not required to fill out job or transfer applications. The employees continued to perform the same jobs they had performed at store 8. The entire management team from store 8 became the management team at store 86.

Store 86 is a larger and newer store than store 8. However, the differences in operation of the two stores are minor. The grocery clerks, delicatessen employees, and bakery department employees were treated as nonrepresented employees. The terms and conditions of employment for union-free employees were implemented. Respondent ceased making contributions to the union pension plans and discontinued dues checkoff.

The General Counsel presented the testimony of Lisa Hughson, a cake decorator at store 8 and now a cake decorator at store 86. Hughson attempted to transfer from store 86 in mid-December. Hughson was not permitted to transfer. She was told by the store manager that she could not transfer because she was nonunion. The transfer was given instead to an employee in the Denver bargaining unit. In February 1999, Hughson attempted to transfer and again the transfer was given to an employee in the Denver bargaining unit. Under the collective-bargaining agreement, employees in the bargaining unit have certain transfer rights. Prior to the opening of store 86, Hughson had transferred into store 8 as a member of the Denver bargaining unit text.

The facts concerning Hughson's transfer history are consistent with the finding that store 8 was part of the Denver multistore bakery workers bargaining unit until the opening of store 86. Hughson's testimony shows that bakery employees in Broomfield lost the right to transfer to stores in the Denver unit when store 86 was opened.

UFCW Local 7 represented employees at store 8 did not have transfer rights to stores in the Denver metropolitan area bargaining unit. UFCW Local 7 had consistently maintained, since at least 1997, that the Broomfield store was a separate bargaining unit and, therefore, only employees in the Denver bargaining unit had transfer rights within that bargaining unit.

D. The Merger of the International Unions

1. Facts

The General Counsel amended the complaint to state the correct name of Bakery Workers Local 26 after the merger of its International Union with the Grain Millers International Union. Respondent denied the labor organization status of the Bakery Workers Local 26 and raised the issue of whether the merger raised a question concerning representation.

Bakery Workers Local 26 presented evidence that in March 1998, Arvan Bergman, then a member of the International's executive board and president of the local union, notified the Union's executive Board that their would be a convention of the International Union in the summer of 1998. The documentary evidence shows only that Bergman notified the executive board of the convention and the need to vote on delegates for the convention. However, Bergman testified that he orally informed both the executive board and the membership that the subject of the merger would be raised at the convention. The

membership voted on delegates to the convention by a secret ballot election. Bergman testified that he mentioned the merger to Stephanie Bouknight, Respondent's manager of labor relations, whenever he saw her between March and October 1998. After, the Grain Millers approved the merger agreement, in October 1998, Bergman informed Steve DiCroce, Respondent's director of human resources, and Bouknight that the two International Unions had agreed to merge.

At the convention, a resolution was presented asking the delegates to support a merger with the Grain Millers International Union. The delegates from Bakery Workers Local 26 voted on behalf of the membership on the question of the merger. The proposed merger was approved by the Bakery Workers International Union in July 1998. The Grain Millers International Union approved the merger in October 1998. A merger agreement was signed by both International Unions in December 1998. The merger became effective on January 1, 1999. In February 1999, Wayne Brewer, Bakery Workers Local 26's president as of January 1, 1999, notified DiCroce, that he wished to change the Union's name in the just negotiated bargaining agreement to reflect the merger of the two International Unions. DiCroce answered that he had "no problem" with that change.

After the merger each local union of the Bakery Workers International Union, including Bakery Workers Local 26, retained its charter and became affiliated with the Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union. Bakery Workers Local 26 did not merge with any other local union. Bakery Workers Local 26 continued to negotiate and administer collective-bargaining agreements and to process grievances just as it had done prior to the merger. There was no change in its dues structure. There was a change in the leadership of Local 26 as of January 1, 1999. However, that change was as a result of regular intraunion elections and was unrelated to the merger. The duties and responsibilities of Local 26's officers did not change. There was no change in Local 26's assets, business records, or physical facilities. The only noticeable effect of the merger was the name change reflecting the Grain Millers as part of the International Union.

2. Conclusions

The Board has judged union mergers or affiliations to present the dual issues of whether union members were accorded due process in the affiliation process and whether the "new" representative is a continuation of the incumbent. Thus the Board examines whether those entitled to participate in the process are afforded an opportunity to consider, discuss, and vote on the question through a reasonably democratic process, and whether the merger does not alter the fundamental identity of the selected representative so as to disrupt the continuity of representation. See *NLRB v. Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986). The Supreme Court in *Seattle-First* specifically declined to consider the propriety of the Board's due process requirements, 475 U.S. 192, at fn. 6. Thereafter in *Paragon Paint Corp*., 317 NLRB 747, 748 (1995) and *Sullivan Bros. Printers*, 317 NLRB 561, 562 fn. 2 (1995). the Board found it unnecessary to determine, in light of the Supreme Court's opinion in *Seattle First*, whether the Board has the authority to impose due process requirements.

The policy encouraging stable bargaining relationships yields only in those circumstances where the organizational changes are so vast as to give rise to a more than speculative inference that majority support no longer exists. *Action Automotive*, 284 NLRB 251 (1987) The party seeking to avoid its bargaining obligation has the burden of showing that the organizational changes are "so dramatic that the postaffiliation union lacks substantial continuity with the preaffiliation union." *Sullivan Bros. Printers*, 317 NLRB 561 (1995), enf. denied 38 F.3d 58 (1st Cir. 1994)."

I first look at whether there was any change in the fundamental identity of Bakery Workers Local 26 because I believe that the nature of the change is a significant factor in determining what authority the Board has to review such internal union matters. Here there was no merger of Local 26 with another local union or with another international union. Rather, it appears that the Bakery Workers International Union absorbed the Grain Millers International Union. However, whether this consolidation is considered a merger of the two International Unions or an absorption of the Grain Millers by the Bakery Workers, there was no significant change in Local 26.

As stated above, Bakery Workers Local 26 continued to negotiate and administer contracts and process grievances just as it had done before the merger. There was no evidence of any change in its relationship with the Respondent. There was no change in the duties and responsibilities of the officers of Local 26. There was no change in the rights or obligations of the membership of Local 26. There was no effect financially on the Union. The only noticeable change was the inclusion of Grain Millers in the title of the affiliation. There is no evidence that any member of Local 26 or any member of any other local of the Bakery Workers objected to the merger. Under such circumstances, the Employer should not be heard to complain. Under such circumstances, the Employer should not be permitted to avoid his obligations under the Act.

Respondent argues that the employee-members of Local 26 were not afforded due process. Normally, the Board would look to see if employees entitled to participate in the process are afforded an opportunity to consider, discuss, and vote on the question through a reasonably democratic process. Here, there is no evidence that the employees discussed or voted on the merger directly. However, they were orally informed of the convention and that the subject would be raised at the convention. The employees participated in a secret ballot election and elected delegates to the convention. The delegates voted on the question of the merger. While that process may not conform to the Board's representation election procedures, it certainly is a democratic method of deciding such issues. In this country, we elect representatives to Congress, who then vote on legislation. The procedure used here, seems analogous.

The Board's analysis rather than being mechanistic and using a strict checklist, is directed at analyzing the totality of circumstances in order to give paramount effect to employees' desires. The relevant factors are: (1) continued leadership responsibilities by existing union officials; (2) perpetuation of membership rights and duties (membership eligibility and dues structure); (3) continuation of the manner in which contract negotiations administration, and grievance processing are effectuated; and (4) the preservation of the certified representative's assets, books and physical facilities. See *Sullivan Bros. Printers*, supra, 38 F.3d 58 (1st Cir. 1994). In this case, all of the four factors listed above show no change in Bakery Workers

Local 26 which would effect the employees' desires for continued representation.

Accordingly, I find that the merger of the two International Unions was essentially an internal union matter and that Bakery Workers Local 26's structure did not change sufficiently so as to permit Respondent to challenge the merger of the International Unions or the name change of Local 26. Therefore, I find that the merger of the two International Unions does not permit Respondent to evade its bargaining obligation to the employees represented by Local 26.

Analysis and Conclusions

A. The Relocation of the Bargaining Units to a New Store

The Board holds that an employer must apply an existing contract to a relocated facility if the operations at the new facility are substantially the same as those at the old facility and if the transferees from the old facility constitute a substantial percentage of the new store employee complement. *Westwood Import Co*., 251 NLRB 1213 (1980) enfd. 681 F.2d 664 (9th Cir. 1982); *Harte & Co*., 278 NLRB 947 (1986); and *Rock Bottom Stores*, 312 NLRB 400 (1993) enfd. 51 F.3d 366 (2d Cir. 1995).

In *Westwood Import Co*., 251 NLRB 1213 (1980), the respondent-employer moved its facility from San Francisco, California, to Hayward, California, a distance of 30–35 miles, during the term of the collective-bargaining agreement. The respondent-employer withdrew recognition from the union, asserting that it had a good-faith doubt of the charging party-union's majority status. The Board found a violation of Section 8(a)(5) and (1) of the Act. The Board held that an existing and effective collective-bargaining agreement remains in effect following a relocation, provided operations and equipment remain substantially the same at the new facility, and a substantial percentage of the employees at the old facility transfer to the new location.

In *Rock Bottom Stores*, 312 NLRB 400 (1993), the Board reaffirmed this test and applied it to retail grocery stores. The Board held that the term "a substantial percentage of the employees" means at least 40 percent of the employees from the old store. The Board reasoned that this rule constitutes an appropriate balance between the transferees' interest in retaining the fruits of their collective-bargaining activity and the newly hired employees' interest in choosing whether to have union representation.

Applying this principle to the instant case, the operations of the new Broomfield store were substantially the same as at the old store. The new store was newer and slightly larger. When the new store opened all six employees in the bakery department had been transferred from the old store. In the clerks and delicatessen departments, 145 out of 150 employees had transferred from the old store. Under these circumstances, it seems clear that Respondent was obligated to continue to recognize the Unions and to apply the terms of the contracts at the new store.

Respondent argues that UFCW Local 7 would not permit employees to transfer so that the number of transferees working in the new store is an artificial number. The facts show that UFCW Local 7 had taken the position that the collective-bargaining agreement in the Metropolitan Denver bargaining unit gave preference to employees in that bargaining unit. Therefore, UFCW Local 7 took the position that employees in the single store unit in Broomfield did not enjoy such privileges. That position was consistent with the Union's position prior to this dispute. In *Rock Bottom Stores*, the Board held that recent hires and recent transferees counted for purposes of determining whether a substantial number of employees from the old store had transferred to the new store. Previously, in *Westwood Imports*, the Board held that recent hires should be counted in determining whether a substantial number of employees had transferred from the old facility. Thus, I find that it is appropriate to consider all of the transferees from store 8 in determining that a substantial majority of the employees transferred to the new location.

Respondent argues that the two Unions had agreed to "store specific language" and thereby waived the right to represent employees at the new store without a NLRB election or card check. Respondent cites *Waymouth Farms*, 324 NLRB 960 (1997), enfd. in part and denied in part 172 F.3d 598 (8th Cir. 1999), to support its argument that by listing the store address in the unit descriptions the Unions agreed to limit recognition to the specific street address of store 8 and to no other location. First, this argument has no factual basis regarding the bakery unit. That unit which was certified by the Board in 1990, was made an accretion to the Denver metropolitan area unit in February 1990. Thereafter, the store was treated as part of a multi-store unit. There is simply no factual basis to argue that the unit was a single store unit or "site specific" unit.

The clerks and delicatessen employees' collective-bargaining agreement did cover only a single store unit. The Board will honor a geographic limitation clause in which a union waives employees' rights to continued representation at a new facility as long as there is no evidence that the employer has secured the waiver by "taking any action to mislead the Union or to keep the Union uninformed." *Waymouth Farms*, 324 NLRB 960 (1997) enfd. in part and enforcement denied in part 172 F.3d 598 (8th Cir. April 5, 1999).

In *Waymouth Farms*, the collective-bargaining agreement recognized the charging party-union as the bargaining representative of the unit employees at *Waymouth Farms*' "Plymouth, Minnesota plants, and at no other geographic locations." The Board found that the respondent-employer had failed to bargain in good faith over the effects of the closing of its store in Plymouth, Minnesota. *Waymouth Farms* had opened a new plant in New Hope, Minnesota, 6 miles away from the Plymouth plant. The Board found that the respondent-employer had failed and refused to bargain in good faith with the union by misrepresenting to the union its intentions and plans regarding relocation of respondent's facility located in Plymouth, Minnesota. With respect to the recognition clause, the Board found that the charging party-union expressly stated that it was accepting the geographic limitation on recognition in large part due to its belief that it could successfully organize the employees at a new location. Further, the Board found that the union agreed to the geographic limitation in exchange for a union security clause. Based on its finding that the respondent-employer had fraudulently concealed the intended location of its new store, the Board ordered the respondent-employer to recognize and bargain with the union at the new plant. The Board noted that absent the language of the contract limiting its application to plants in Plymouth, Minnesota, under *Harte & Co*., 278 NLRB 947 (1986), the contract from the old Plymouth plant would apply at the New Hope plant. However, due to the geographic

limitation agreed to by the union, the Board did not order the respondent to apply the Plymouth contract to the New Hope employees. The court of appeals affirmed the Board's finding of a violation but denied enforcement of the remedial order with respect to recognition and bargaining. The court found that the language of the initial collective-bargaining agreement was clear and that the union was bound by it. The court found that the charging party-union had agreed to the geographic limitation on representation in exchange for a union-security clause. Thus, the court held that the Board could not order the respondent to recognize and bargain with the union at the New Hope facility.

However, this case is easily distinguishable from *Waymouth Farms*. In this case the unit is described as the employees at "the grocery store owned or operated by the Respondent at 5150 West 120th Avenue, Broomfield, Colorado (such jurisdiction to apply to the current store represented by the Union). First there is no clear language that the UFCW Local 7 waived its right to represent the employees at another location. The language is consistent with the fact that Respondent operated only one store in Broomfield. The only limitation I read into the clause is that if Respondent owned or operated an additional store in Broomfield, the contract would not apply. Unlike *Waymouth Farms* there is no clear or unambiguous geographic limitation. Further, there was no evidence that the parties understood the language "such jurisdiction to apply to the current store represented by the Union" as a waiver of the UFCW Local 7's right to represent the employees if the store relocated to another location in Broomfield.

Respondent argues that by listing 5150 West 120th Avenue, the parties agreed that the contract would apply to no other location. I note that in my 28 years of experience, I have found that in Board certifications it is the usual practice, particularly in single location units, to list the address of the employer's facility. Certainly, by listing the address of the employer's facility the Board does not intend to waive the Union's or employees' rights to representation if the facility moves or changes its address. Similarly, in collective-bargaining agreements, it is the usual practice, particularly in single location units, to list the address of the employer's plant or store. I know of no case where the Board found that to be a waiver of representation rights at a replacement facility. To the contrary in *Westwood Imports*, the Board found that the existing contract applied at the replacement facilities despite the fact that the Board certification and the recognition clause of the existing collective-bargaining agreement listed the street address of the San Francisco facility. The Board did not, in *Waymouth Farms*, intend to overrule *Westwood Imports, Harte & Co*., or *Rock Bottom Stores*. Rather, the Board cited those cases as the traditional rule. It distinguished *Waymouth Farms* on the grounds that the union had knowingly agreed to a geographic limitation on recognition to Plymouth, Minnesota, plants and no other geographic locations and that the union had received consideration for such limitation or waiver.

Moreover, it is well established that a waiver of statutory rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Owens-Brockway Plastic Products*, 311 NLRB 519 (1993). I find no evidence of a waiver here. Certainly, Local 7 agreed to a single store bargaining unit. However, I cannot find that by using the address of the store as a descriptive term, UFCW Local 7 agreed to waive representational rights at a new facility. In *Waymouth Farms* the evidence showed that the parties bargained for a geographic limitation. The charging party-union received something in return. Most important, the contract contained clear and unambiguous language that the agreement applied to facilities in Plymouth, Minnesota, "and no other geographic locations." The mere listing of store 8's address in this case does not establish that the parties bargained for a geographic limitation or that Local 7 waived its right to representation at the new store 86.

B. Additional Violations

As found above, Respondent unlawfully withdrew recognition from the two Unions at store #86 and unlawfully refused to apply the two collective-bargaining agreements to the employees at store 86. It follows that as part and parcel of such conduct, Respondent unlawfully implemented terms and conditions of employment for the employees in the bakery workers unit and the grocery and delicatessen unit. I further find that Respondent's September notice to employees in the grocery and delicatessen department, that store 86 would operate nonunion, without notice to the Union, constituted an additional violation of Section 8(a)(5) and (1). Respondent was obligated to bargain with UFCW Local 7 and could not lawfully deal directly with employees in that unit. *Ad-Art, Inc*., 290 NLRB 590 (1988); *Master Plastering Co*., 314 NLRB 349 (1994).

Finally, under the collective-bargaining agreement, employee Lisa Hughson was eligible to transfer from store 86 to another store in the Denver bargaining unit. However, Respondent based on its unlawful refusal to apply the contract denied Hughson, the opportunity to transfer. I, therefore, find that the refusal to transfer Hughson violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent King Soopers, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions, Bakery, Confectionery, and Tobacco Workers and Grain Millers International Union, Local 26, AFL–CIO and United Food and Commercial Workers Union, Local 7, are labor organizations within the meaning of the Act.

3. Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Bakery Workers Local 26 and refusing to apply the collective-bargaining agreement to its store #86 in Broomfield, Colorado.

4. Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from UFCW Local 7, and refusing to apply the collective-bargaining agreement to its store #86 in Broomfield, Colorado.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by bypassing UFCW Local 7 and directly notifying employees that store #86 would be operated on a nonunion basis.

6. Respondent has violated Section 8(a)(5) and (1) of the Act by denying employee Lisa Hughson a transfer pursuant to its collective-bargaining agreement with Bakery Workers Local 26.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectu-

ate the policies of the Act. It is recommended that Respondent be ordered to abide by the terms of its existing collective-bargaining agreements with Bakery Workers Local 26 and UFCW Local 7 and to the extent that it has not already done so, make all fringe benefit contributions as required by each contract, with interest determined under the standards set forth in *Merryweather Optical Co*., 240 NLRB 1213 (1979). Additionally Respondent shall be required to make the employees whole for any losses they may have suffered from Respondent's failure to make such contributions in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1989), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest to be provided in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[3]

ORDER

The Respondent, King Soopers, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Bakery Workers Local 26, or withdrawing recognition from the Union as the exclusive bargaining representative of the bakery department employees employed by Respondent at its store 86 in Broomfield, Colorado.

(b) Refusing or failing to apply the terms and conditions of the collective-bargaining agreement with Bakery Workers Local 26 covering store 8 to store 86.

(c) Refusing to bargain with UFCW Local 7 or withdrawing recognition from the Union as the exclusive bargaining representative of the grocery and delicatessen employees employed by Respondent at its store 86 in Broomfield, Colorado.

(d) Refusing or failing to apply the terms and conditions of employment of its grocery and delicatessen collective-bargaining agreement with UFCW Local 7 covering store 8 to Store 86.

(e) Bypassing UFCW Local 7 and dealing directly with bargaining unit employees concerning terms and conditions of employment for grocery and delicatessen employees at store 86.

(f) Refusing to permit bakery department employees to transfer under the terms and conditions set forth in the collective-bargaining agreement between Respondent and Bakery Workers Local 26.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from a request, bargain with Bakery Workers Local 26 as the exclusive representative of the bakery department employees employed at its store 86 in Broomfield, Colorado.

(b) Within 14 days from a request, permit employee Lisa Hughson to transfer to another store in the Bakery Workers Local 26 Denver bargaining unit.

(c) Within 14 days from a request, bargain with UFCW Local 7 as the exclusive representative of the grocery and delicatessen department employees employed at its store 86 in Broomfield, Colorado.

(d) To the extent that it has not already done so, make all fringe benefit contributions as provided by the collective-bargaining agreements with Bakery Workers Local 26 (bakery department employees) and UFCW Local 7 (grocery and delicatessen department employees), and make whole the employees in each bargaining unit in the manner set forth in the remedy section of this decision by reimbursing them with interest for any losses they may have suffered as a result of the failure of Respondent to abide by the terms of the two collective-bargaining agreements referenced above.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under this order.

(f) Within 14 days after service by the Regional Director, post at its Broomfield, Colorado facility copies, in English and Spanish, of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since December 9, 1998.

(g) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[3] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."